NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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**Re:** ***Communication Technologies, Inc. v. Golden Key Group, LLC***
**Case No. CL–2020–17877**

Dear Counsel:

The issue before the Court is whether Defendant Golden Key Group, LLC ("GKG") breached its contract with Communication Technologies, Inc, ("COMTek"). The Court finds that GKG did breach the contract and will award COMTek judgment for $8,703,823.63.

OPINION LETTER

## I. OVERVIEW.

The United States Army contracts with private companies to provide Army Reserve Officer Training Corps ("ROTC") instructors to colleges and universities across the United States. Plaintiff COMTek has been involved in contracting with the Army to provide such instructors as early as 2002, variously as the prime contract holder or as a subcontractor. At the time the Army put the present contract out to bid, COMTek was an incumbent subcontractor for GKG's predecessor on the prime contract.

Despite COMTek's experience, it needed Defendant GKG's purchasing vehicle to help it win the Army ROTC contract for 2017. GKG, which tried and failed to win the ROTC contract at least two times, needed COMTek's experience. The companies ultimately decided to pursue the government contract with GKG as the prime contractor, and COMTek as a subcontractor.

The Army selected the companies and awarded the prime contract to GKG, with COMTek as a subcontractor. However, the parties could not start on the contract immediately. Due to a bid protest challenging the award of the prime contract to GKG, work on the prime contract could not begin until March 26, 2018.

While the bid protest was pending, COMTek and GKG began negotiating a subcontract ("Subcontract"), which they executed on June 7, 2018. The Subcontract awarded COMTek 83 instructor positions to fill, which was 49% of the workshare, and GKG 86 positions, constituting 51% of the workshare.

The Subcontract featured a base period ending August 31, 2018, but also included statements and clauses concerning the extension of the Subcontract for two 12-month periods following the base period— "Option Year 1" and "Option Year 2.".

The Subcontract contained a non-solicitation clause, prohibiting COMTek and GKG from soliciting or employing employees of the other who were working or had worked on the project. The clause was enforceable during the existence of the Subcontract and for one year following the expiration or termination of the Subcontract.

In July 2018 the Army asked GKG to expand the number of ROTC instructor placements, giving them only one month to fill the new openings. Along with increasing the size of the Prime Contract in terms of quantity of employees, the Army also increased the rates under the prime contract.

On August 31, 2018, at the end of the base period listed in the Subcontract, the parties had a dispute over how to assess the extra work between them. While they negotiated, GKG emailed COMTek to authorize it to proceed to work under Option Year 1, the first 12-month extension listed in the Subcontract. COMTek proceeded to work in September 2018 while they negotiated.

In December 2018 GKG sent COMTek a proposed modification of the Subcontract, under which COMTek would have 10 less positions than they had at the time. With the loss of the 10 positions COMTek decreased from 49% of the workshare to 46% of the workshare. COMTek signed the proposed modification of the Subcontract, but with a qualification. It purportedly signed "subject to correction." COMTek believed it was entitled to 49% of the workshare under the contract.

On August 30, 2019, instead of exercising its Option Year 2 contract extension, GKG sent COMTek a "cure notice." The notice alleged that COMTek was not complying with the terms of the Subcontract by *inter alia* failing to provide GKG personnel with full access to the COMTek database and by maintaining a deficient recruiting website. Even though Option Year 1 ended that day, the cure notice authorized COMTek to "continue performance under Option Year 1 PWS until September 30, 2019," at which time the Subcontract would be terminated. COMTek continued working that extra month.

On September 11, 2019, GKG notified COMTek via email that it was being removed from the prime contract as a subcontractor, effective September 30, 2019. GKG also notified by email all personnel working on the Army ROTC Program that COMTek was being removed from the contract. GKG sent this email directly to all COMTek employees working on the contract. In the email GKG included a link to a new website GKG used for recruiting personnel for the Army ROTC program. The Court finds as fact that this email was a direct attempt by GKG to get COMTek employees to visit the website and therein re-apply for their jobs with GKG.

Upon receiving the GKG's email announcing COMTek's impending termination on September 30, 2019, COMTek personnel began to reach out to managers, recruiters, and other GKG personnel seeking clarification and next steps as to what they should do. COMTek employees were told at various times, by different GKG personnel, that they could go to GKG's new website and apply for their current positions, and that they could then continue with the program in their same positions. In early September 2019 COMTek had 157 individuals working on the program. Following the email from GKG, as of September 26, 2019, 151 of those COMTek employees had applied through GKG's new website and had received offers, of which 146 accepted those offers.

COMTek sued GKG for breach of contract. It alleges (1) GKG failed to pay it for its work in September 2019; (2) GKG breached the non-solicitation clause in the Subcontract; (3) GKG underpaid COMTek by reducing COMTek's workshare from 49% to 46%; (4) GKG failed to passthrough the rate increase to COMTek; (5) GKG prematurely terminated Option Year 2 of the Subcontract after only one month and owes the remaining eleven months; and (6) GKG misused COMTek's database.

GKG denies breaching the contract and raises affirmative defenses. It alleges: (1) the Subcontract expired on August 31, 2018; and (2) COMTek was the first to breach the Subcontract.

## II. GKG's AFFIRMATIVE DEFENSES FAIL.

GKG argues it cannot be liable for breach of contract because the Subcontract expired on August 31, 2018, long before the breaches COMTek alleges. Alternatively, it argues COMTek was the first to breach the contract and, therefore, is estopped from asserting breach of contract against GKG.

### A. The Subcontract did not Terminate August 31, 2018.

1. GKG argues that COMTek's refusal to unqualifiedly accept GKG's modification proposal for Option Year 1 left the option unexercised and the Subcontract terminated as of August 31, 2018.

GKG maintains that the Subcontract expired August 31, 2018, when COMTek on December 13, 2018, signed a proposed subcontract modification proposed by GKG with a qualification—"subject to correction."

GKG reasons that it had the unilateral right to exercise the Option Years or not. GKG points to Part I, Section 4 of the Subcontract, which states that the Subcontract has a base period which extends until August 31, 2018, "with two (12) month option periods." This part of the Subcontract further states, in relevant part, that "[i]n the event of the extension of the Project by the Client, Golden Key Group intends to extend through a unilateral modification to this Subcontract, the term of this Contract for that applicable period of performance shown below." "Should Golden Key Group exercise any option(s) hereunder, the exiting (sic) terms and conditions of this Subcontract, as amended, shall apply during the option period(s)."

GKG argues that the phrase "intends to extend" makes the extension optional at GKG's sole discretion. Therefore, it argues it was not required to exercise the option periods and extend the Subcontract past the base period, it did not unilaterally modify the Subcontract to exercise such extension, and the Subcontract expired at the end of the base period, on August 31, 2018. Therefore, GKG argues, the Subcontract expired at the end of the base period, on August 31, 2018, and that it did not exercise the two subsequent option periods.

GKG further argues that GKG and COMTek failed to come to a meeting of the minds following August 31, 2018, due to COMTek's qualified acceptance of GKG's modification proposal. As a result, it argues, there was no valid contract between the parties following that time.

2. COMTek argues GKG did exercise Option Year 1 and its qualified acceptance of the modification was expressly permitted by the Subcontract.

COMTek rebuts GKG's argument that COMTek's qualified acceptance of GKG's modification offer rendered it a rejection of the offer by asserting the Subcontract expressly permitted acceptance of modifications under protest and contained a dispute resolution provision for this exact purpose.

Alternatively, it argues that even under common law that there was no rejection or counteroffer made in December 2018 which would have caused the Subcontract to expire, and as a result the Subcontract continued past the expiration of the base period on August 31, 2018. COMTek believes that GKG was required to extend the Subcontract through the two Option Year periods, since otherwise the clauses with the terms "intend to exercise" would be meaningless. Therefore, COMTek not only does not believe that the Subcontract ended on August 31, 2018, but that since the Army extended that Contract with GKG, the Subcontract continued.

COMTek also argues that GKG is estopped from raising a defense of expiration since GKG did not raise an objection until after a year from the date of the claimed expiration, during which time GKG continued to operate as though the Subcontract was still in existence.

3. Analysis: The Subcontract did not terminate August 31, 2018.

GKG's affirmative defense that the Subcontract expired at the conclusion of the base period, August 31, 2018, fails. While COMTek is wrong to assert that GKG was required to extend the Subcontract through the Option Years, COMTek is correct that the Subcontract was extended past the base period, and as a result COMTek's breach of contract claims are not barred since the Subcontract was still in existence.

The Court finds the parties extended the Subcontract past the base period, and that both parties were operating under Option Year 1 after August 31, 2018. GKG authorized COMTek to continue working after August 31, 2018, and both parties continued to work and operate under the Subcontract.

Although GKG was not obligated or required to extend the Subcontract beyond the base period into any of the Option Years, as COMTek claimed, GKG did in fact extend it through Option Year 1. GKG authorized COMTek to continue performance on August 31, 2018, and COMTek performed. The Court finds GKG offered Option Year 1 to COMTek and COMTek accepted the extension offer. Its qualification and dispute in its acceptance was expressly permitted under the Subcontract. Part II, Section 4 of the Subcontract required COMTek to keep working through a dispute. It reads,

> "[C]hanges to the individual SOW provided within any Subcontract modification directed and/or approved in writing by the Prime, may be implemented. The Subcontractor agrees to immediately implement whatever changes, modifications or Change Orders to its areas of subcontracted Work that are necessary to comply with the directive issued by the Prime . . . [I]f any such change causes a material increase or decrease in any hourly rate or the not-to-exceed price, or the time required for the performance of the Subcontract, Golden Key Group shall make an equitable adjustment in the hourly rates or delivery schedule, or both, and shall modify this Agreement's not-to-exceed price . . . *[F]ailure to agree to any adjustment shall be deemed a dispute under the Disputes clause of this Subcontract. However, Subcontractor shall proceed with the Work as changed without interruption and without awaiting settlement of any such claim.*" (Emphasis supplied).

Therefore, under the Subcontract, COMTek was required to continue work during the negotiations and was permitted to simultaneously seek an equitable adjustment. COMTek did not reject the modification offer as GKG asserts, rather it was following the Subcontract.

The Court finds there was a binding contract beyond August 31, 2018—Option Year 1—under which GKG may be liable for any breaches.

**B. COMTek was Not the First Party to Breach.**

GKG argues that even if the parties had a contract beyond August 31, 2018, COMTek was the first party to breach it and, thus, is estopped from enforcing any subsequent breach by GKG. "The first party to materially breach a contract cannot enforce it." *Denton v. Browntown Valley Associates, Inc.*, 294 Va. 76, 88 (2017). Briefly stated, GKG alleges COMTek failed in early 2019 to provide GKG with contractual access to employee and applicant resumes and information, access to the COMTek website, and that it failed to keep its recruiting website in proper condition. GKG alleges that this was a material breach of the Subcontract.

COMTek responds that GKG was the first to breach by failing to make timely payments (within 5 days after payment from the Government) within months of the start of the contract, in early 2018. It also argues that the alleged breaches that GKG asserts are factually false.

In the alternative, COMTek argues that GKG's allegations, even if true, do not amount to a material breach by COMTek.

The Court finds as fact that COMTek did not breach the Subcontract. While COMTek was particular in who it gave unqualified access to its database, it sufficiently made employee and applicant resumes and information, and access to the COMTek website, available to GKG. Any website deficiencies were minimal. COMTek used the website for years and it was a successful tool for recruiting ROTC instructors.

GKG was the first party to breach the contract by failing to make timely payments to COMTek. However, even if COMTek was the first party to breach, its alleged breach was not material as a matter of fact. "A material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Horton v. Horton*, 254 Va. 111, 115-16 (1997); *see also Neely v. White*, 177 Va. 358 (1941). The Court finds COMTek's relatively minor restrictions on how GKG could access COMTek's data, and GKG's other complaints as set forth in the "cure notice" it sent COMTek do not amount to a material breach by COMTek.

The Court finds GKG's affirmative defense that COMTek is barred from enforcing the Subcontract as the first material breaching party fails.

## III. GKG BREACHED THE SUBCONTRACT BY FAILING TO PAY COMTEK FOR COMTEK'S SEPTEMBER 2019 WORK.

The elements required to prove a breach of contract claim and to be awarded damages are: an existing obligation between the parties, a breach of that obligation, and resulting damages. *Navar, Inc. v. Federal Business Council*, 291 Va. 338, 344 (2016).

COMTek claims that it performed services on the Subcontract through September 30, 2019, but was not paid for the final month. Part I, Section 15 of the Subcontract mandated that COMTek submit all requests for payment by invoice for payment by GKG. Payment was due within 5 days of COMTek submitting the request. COMTek invoiced GKG for $923,472.06. GKG paid COMTek only $227,053.50, leaving a difference of $696,418.56.

GKG does not persuasively rebut COMTek's claim. GKG admitted, through the testimony of its CEO, Gretchen McKraken, that GKG owed this amount of money to COMTek, and had not paid. Instead, GKG relies on its affirmative defenses, which the Court rejects for the reasons in part II of this Opinion Letter. GKG also argues that COMTek has not properly pled this claim, which should have been through *quantum meruit*. The Court disagrees. COMTek pled GKG's failure to pay it for September 2019 work in ¶¶ 15, 46, 51, and 99 of its Complaint. It expressly listed the September 2019 unpaid invoice as a line item under Count II of the Complaint in ¶ 99.

COMTek properly alleges that there was an existing contract between the parties for COMTek to provide work and services until September 30, 2019. The Court finds this was an extension of Subcontract Option Year 1 when GKG authorized COMTek to continue to work through September 30, 2019.[1] COMTek performed work pursuant to GKG's authorization and must be paid.

[1] The Court disagrees with COMTek that this was the start of Option Year 2 for the reasons discussed in part V(B) of this Opinion Letter, below.

The Court will award judgement to COMTek as to this portion of Count II for $696,418.56.

## IV. GKG BREACHED THE NON-SOLICITATION CLAUSE OF THE SUBCONTRACT.

Part I, Section 13 of the Subcontract states that during the existence of the contract, and for a period of one year after the termination of the contract that the parties will not "solicit, employ, or otherwise engage any of the other parties' employees … who were involved in the project." Upon a breach of this section, the breaching party is to pay the aggrieved party "at an amount equal to the greater of $50,000 or 100% of the annual base salary for any such employee as liquidated damages."

COMTek argues that GKG's CEO Gretchen McKracken's email to COMTek's employees was a solicitation of those employees to apply for positions at GKG. It notes that other GKG employees sent emails and spoke on the phone with COMTek employees. COMTek thus alleges that GKG breached the contract by both soliciting and employing COMTek personnel within a year of the termination of the Subcontract (or during the existence of the Subcontract). It seeks $7,850,000 for GKG's allegedly improper solicitation of 157 of its 159 employees, almost all of whom GKG offered to hire.

GKG raises several arguments in response. It argues: (1) it did not solicit COMTek's employees; (2) the Subcontract expired a year prior to the alleged solicitation and hiring, (3) the non-solicitation clause is unenforceable as being overbroad and unreasonable, or is contrary to public policy, and (4) the liquidated damages provision of the non-solicitation clause is an unenforceable penalty.

For the ensuing reasons the Court disagrees with GKG and will award judgement to COMTek on Count I of the Complaint in the amount of $7,850,000.

### A. GKG Solicited COMTek's Employees.

GKG argues it did not solicit COMTek's employees in breach of the Subcontract's non-solicitation clause. Alternatively, it relies on an exception to the clause— under which neither party is in violation of the non-solicitation clause if the allegedly solicited employees "applied for positions in response to internal postings, employment advertisements, or other general solicitations of employment."

GKG argues it posted available positions on its new website that it used for recruiting, which is a permitted internal posting. It did not initiate conversations with COMTek employees, rather it responded to their outreach. GKG personnel who spoke with COMTek employees who later applied for jobs at GKG were not advising them or telling them to apply, but simply giving them options of what to do under the specific circumstances.

The Court finds as fact that GKG did solicit 157 of COMTek's employees in September 2019. And, it is undisputed GKG hired almost all of them. GKG's CEO Ms. McKracken sent an email targeted to COMTek employees to visit its new recruiting website, writing that GKG's goal was to recruit current and future ROTC members. When COMTek employees called or emailed in response, they were told to reapply for their jobs on the new website. GKG employees also sent emails and called COMTek employees directing them to reapply for their jobs with GKG. GKG engaged in a planned, organized full-press outreach to COMTek employees.

The Court finds GKG's actions were not general advertisements, such as a display ad in *Army Times*, or general internal postings, such as a passive entry on GKG's own website. Rather they were targeted solicitations to the very COMTek employees GKG knew it needed to properly perform its contract with the U.S. Army. GKG's contract performance would have been impossible to perform without COMTek's employees because the evidence showed that finding and hiring ROTC instructors was a lot of work. Indeed, it was the *raison d'etre* of the prime contract with the Army. GKG knew it needed COMTek employees to avoid breaching its contract with the Army. To fulfil its contract with the Army it directly solicited COMTek employees in direct breach of its subcontract with GKG.

As to the number of COMTek employees GKG solicited, the Court is persuaded with the overwhelming circumstantial evidence proving the number. The Court considered the obvious and direct manner of GKG's solicitation. It considered the relative lack of indirect or non-targeted efforts to hire ROTC instructors. Finally, it considered the rapid assimilation of almost all COMTek's employees in such a short period of time—less than a month. By directly reaching out to all COMTek employees, directing them to reapply for their jobs on the GKG website, and following up with stragglers until they hired almost all COMTek employees, the Court is satisfied GKG improperly solicited 157 employees.

### B. GKG's Solicitation of COMTek's Employees Occurred During the Prohibited Period.

GKG argues the Subcontract expired August 31, 2018, more than a year before the alleged solicitation in September 2019. This is based on its affirmative defenses that the Court rejected in part II of this Opinion Letter. The Court finds COMTek last performed work under the Subcontract September 31, 2019, so GKG was banned from soliciting COMTek employees until August 1, 2020—long after GKG's September 2019 solicitations.

### C. The Non-Solicitation Clause is Neither Overbroad or Unreasonable and Does Not Offend Public Policy.

GKG argues COMTek failed to prove the non-solicitation clause was narrowly tailored to protect a legitimate business interest. It also argues the clause offends public policy if it could have negatively affected former employees. "[W]hether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of

the party in favor of whom it is given, and not so large as to interfere with the interests of the public." *Merriman v. Cover, Drayton & Leonard*, 104 Va. 428, 436 (1905).

COMTek had a legitimate interest in its employees. The employees, its website and database, and its' leaders experience were really COMTek's only valuable assets. The Court finds it took COMTek considerable time and expense to acquire its workforce. Just as COMTek teamed with GKG's predecessor as subcontractor on the Army ROTC contract, it could have served as the prime contractor, or subcontractor to a future successor to GKG, on the Army's next contract award. But this future work would obviously be less likely without its valuable workforce. A company that has incumbent employees is simply more valuable that a company that needs to find the employees *de novo*. When it joined with GKG to compete for and service the Army ROTC contract, it relied on the non-solicitation agreement to protect the company from GKG simply adopting COMTek's workforce as its own—which GKG ultimately did.

The Court considered the burden of the non-solicitation clause on the employees themselves. It finds the burden was minimal. First, the employees could have worked for GKG under the non-solicitation clause exception permitting GKG to hire them through general solicitations. The clause simply made GKG work harder to hire them using less effective passive methods. GKG did not want to do this because it would have likely resulted in them breaching their prime contract with the Army and losing it entirely. Second, the employees could have worked for any other company to win the Army ROTC contract in the near future. The evidence showed that the Army and the two contractors were very sensitive to the "fill rate"—the percentage of employees hired for every open ROTC instructor slot the Army requested. Everyone feared that the Army would terminate the prime contract if GKG and COMTek failed to adequately staff the contract. Logically, this means that had GKG been unable to hire most of COMTek's former employees it could have prematurely lost the contract and another contractor could have swept in to hire COMTek's former employees without any restraint.

The non-solicitation agreement really burdened GKG instead of the employees. Had it not breached the contract, the non-solicitation clause would have restrained GKG from terminating COMTek, absent some extreme event the Court finds missing in the present case. The Court finds GKG's complaints about COMTek in its "cure notice" were really trivial personality disputes between company leaders and their inherent rivalry. The Court did not believe GKG's complaints of COMTek's website quality, denial of access to the COMTek database, and other disputes to be serious material problems. Rather they were pretextual termination reasons. Nominally, the parties were on the same team working together on the present contract. However, both parties knew the Army could shuffle the deck soon. Indeed, GKG was the beneficiary of the immediately recent shuffle—COMTek was a subcontractor to GKG's predecessor before it seamlessly swapped to be the subcontractor to GKG. Loyalty in this contracting world does not seem strong. As to the employees, from their perspective, different companies swapped in and out of the Army ROTC contract with a core employee group doing the same work and simply seeing different signatures on their paychecks.

Finally, the Court considered GKG's argument that the non-solicitation clause is void as per Executive Order No. 13495. As the Court understands this Order, it deals with situations where one prime contract is ending, a following contract is awarded, and the contractor that is taking over the second contract hires the majority of the predecessor's employees. This is different from the present case where a prime contractor has terminated a subcontract when the prime contract is continuing and in the middle of performance. Alternatively, the Court finds the ROTC instructors at issue in this case are professionals, not service employees covered by the Order.

The non-solicitation agreement was narrowly tailored to protect COMTek's legitimate business interest in its employees. It did not violate public policy.

**D. The Liquidated Damages Provision in the Non-Solicitation Clause is Not an Unenforceable Penalty.**

GKG asserts that the liquidated damages clause in the non-solicitation provision of the Subcontract is a penalty, and thus is unenforceable. The clause sets damages at $50,000 per improperly solicited employee. A liquidated damages clause is construed as a penalty when the amount in the clause is disproportional to any probable loss that could occur, or if the amount grossly exceeds the actual damages. *Gordonsville Energy, L.P. v. Virginia Elec. & Power Co.*, 257 Va. 344 (1999). "[A] liquidated damages clause is invalid only when the actual damages contemplated *at the time of the agreement* are shown to be certain and not difficult to determine or the stipulated amount is out of all proportion to the actual damages." *Boots, Inc. v. Prempal Singh*, 274 Va. 513, 518 (2007).

As an initial matter, the Court holds GKG waived this argument. Part I, Section 13 of the Subcontract, a provision GKG authored, states: "the parties waive any rights to assert such liquidated damages are a penalty." Sophisticated parties may both agree to liquidated damages provisions and waive defenses that the contractual amount is void as a penalty unrelated to actual damages. *Gordonsville Energy, L.P*, 257 Va. at 355-56.

Alternatively, the Court finds the $50,000 per employee penalty for each employee that GKG solicited or employed within a year of the end of the Subcontract was neither disproportional nor grossly excessive considering the business decimation this breach caused COMTek. Had GKG internalized these liquidated damages before its breach as it should have, it would have been much more open to tolerating COMTek's positions in the intercompany disputes and less strident in its own. It would not have absolutely pressed its relatively trivial complaints in its "cure note," but left some of them on the cutting floor of contract negotiations. The Court considered the lost profits to COMTek from each employee over a potential multi-year period. The employees generated over $1.6 million per year for COMTek. But for GKG's breach, they could have been working for COMTek for the duration of the present contract and make COMTek a strong candidate for follow on contracts. One must remember, prior to GKG, COMTek had a role in the Army ROTC contract as general or subcontractor for a long time. The liquidated damages, representing less than five years of COMTek's reasonably foreseeable

profits now forgone and a now-destroyed company, is proportionate to the harm. In any event, GKG agreed to the liquidated damages and expressly waived the argument it now makes.

## V. OTHER BREACH ALLEGATIONS.

COMTek argues GKG breached the Subcontract in four other ways. It claims the following: First GKG decreased its workshare on the prime contract from 49% to 46%. Second, GKG failed to pass a rate increase from the prime contract down to it. Third, GKG terminated the Subcontract eleven months early. Fourth, GKG misused COMTek's database.

### A. GKG Breached the Subcontract Workshare and Passthrough Provisions.

The Army dramatically increased the size of the prime contract after performance commenced. COMTek complains GKG took more than its fair share of the new positions to fill, reducing COMTek's percentage share of the contract. Part I, Section 2 of the Subcontract states that COMTek will have 49% of the workshare, and that GKG will "continue best efforts to sustain that percentage." COMTek therefore seeks damages from that decrease in the workshare percentage, which they calculate to be losses of $108,304.44.

Additionally, the Army increased the price in the prime contract during Option Year 1, but COMTek complains that GKG did not pass the price increase to it. Part I, Section 2, of the Subcontract states that "[s]hould the government approve a price adjustment, Prime will flow down appropriate adjustments." COMTek has calculated the damages from this failure to pass the rates down as either $123,191.31 or $49,100.63, depending on the rate that is used as the passthrough.

GKG relies on its affirmative defense that the Court rejected in part II of this Opinion Letter. It claims the Subcontract expired at the end of the base period, on August 31, 2018, and as a result there was no valid contract to breach. However, the Court finds as fact the Subcontract did not expire on August 31, 2018. It continued through Option Year 1.

The Court finds GKG did (1) reduce COMTek's workshare to 46%, and (2) failed to pass through the rate increase, breaching the Subcontract. It will award COMTek judgement on Count II of its Complaint in the amount of $108,304.44 for the workshare issue and $49,100.63 for the passthrough issue.

### B. GKG Did Not Breach the Contract Extension into Option Year 2.

Part I, Section 4 of the Subcontract states that "[i]n the event of the extension of the Project by the Client, Golden Key Group intends to extend through a unilateral modification to this Subcontract, the term of this Contract for that applicable period of performance shown below." COMTek argues that this provision of the Subcontract required GKG to exercise the options and extend the Subcontract provided that the Army extended the prime contract into both Option Years 1 and 2.

GKG argues that COMTek's interpretation improperly turns an option into a mandate.[2] As to GKG's interpretation that it had discretion to exercise the two Option Years, the Court agrees with GKG.

The plain meaning of Part I, Section 4 of the Subcontract is that GKG had the option to extend the Subcontract through specific 12-month extensions if it chose to do so. This provision was not meaningless, as COMTek argues. It allows GKG the option to extend the Subcontract at the same terms of the current Subcontract, and remain contracted with COMTek, if it so wished.

The Court previously found that GKG exercised Option Year 1. *See* part II(A)(3), above. Briefly stated, the Court found COMTek's conditional acceptance of GKG's Option Year 1 proposal was expressly permitted under the Subcontract. However, the facts are different as regarding Option Year 2. Unlike Option Year 1, GKG did not offer a contract modification. Rather, it issued a "cure notice" to COMTek, informed COMTek that it would terminate the Subcontract September 30, 2019, and insisted on performance through that day. The Court finds this was GKG's extension of Option Year 1 for one month and not an exercise of Option Year 2.

### C. GKG Did Not Misuse COMTek's Database.

COMTek claims GKG misused the COMTek database to recruit for a rival, Cornerbrook. GKG responds that the system was used for recruiting for GKG, COMTek, Goldbelt, and Cornerbrook, and that this regularly occurred. Alternatively, GKG argues that even if the website was misused there were no damages.

The Court is unpersuaded GKG misused the database. The parties were collectively using the database for recruiting as permitted by the Subcontract. Indeed, the database is a large part of what COMTek brought to the Subcontract.

## VI. CONCLUSION.

GKG breached the Subcontract with COMTek in most of the ways alleged by COMTek. The Court will enter judgment for COMTek for $8,703,823.63 ($696,418.56 for non-payment for COMTek's work September 2019, $7,850,000 for the non-solicitation breach, $108,304.44 for the breach of the workshare, and $49,100.63 for the breach of the passthrough).

An appropriate Order is attached.

[2] It also relies on its affirmative defenses that this Court rejected in part II of this Opinion Letter.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

**V I R G I N I A:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

| | | |
|---|---|---|
| COMMUNICATION TECHNOLOGIES INC. *Plaintiff,* | ) | |
| v. | ) | CL–2020–17877 |
| GOLDEN KEY GROUP, LLC Defendant. | ) | |

**ORDER**

THIS MATTER came before the Court for trial. And, for the reasons stated in the Opinion Letter of September 14, 2022, that the Court incorporates into this Order by reference, it is

ORDERED the Court awards judgment in favor of Plaintiff Communication Technologies, Inc. against Defendant Golden Key Group, LLC in the amount of $8,703,823.63; and

ORDERED that of this judgment the Court awards pre-judgment interest on $696,418.56 as of November 1, 2019, at the judgment rate; interest on the balance begins to accrue on the date of judgment.

THIS CAUSE IS ENDED.

[redacted] Judge David A. Oblon

SEP 14 2022

Entered

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.